

June 1997

The Continuing Evolution of Copyright Law

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Recommended Citation

Cox, John E. (1997) "The Continuing Evolution of Copyright Law," *Against the Grain*: Vol. 9: Iss. 3, Article 19.

DOI: <https://doi.org/10.7771/2380-176X.2144>

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The Continuing Evolution of Copyright Law

by John E. Cox, Managing Director, Carfax Publishing Company, Oxford, UK

Please note that British spelling has been retained. — KS

The Application of Copyright and its Importance

There continues to be much debate about the applicability of copyright - and other legal regulation - to electronic publications within the academic community. Some wilder spirits maintain that information should be as free as the air, without any regulation, whether by obscenity, privacy, defamation, intellectual property or any other sort of law.



This was once tried, during the French Revolution. The press and publishing were deregulated in 1789. The result was the collapse of literary publishing, and an explosion in seditious and pornographic material. In 1793 the revolutionary government reversed its policy, and restored order, recognising the rights of the

author as creator and owner of the work and the reader as a consumer.

Copyright is as much an economic issue as a legal issue. The copyright system is intended to encourage creativity by permitting the originators of works to profit from their endeavours. The issue is always how to strike the balance between the rights of creators and those of users.

As universities, learned societies, publishers, librarians and academics debate whether copyright is an appropriate legal structure to build round scholarship and research, laws are being changed at both the national and international level.

Changes to the Berne Convention

1996 saw a flurry of international activity leading to a possible Protocol to the Berne Convention. The sixth session of the Committee of Experts in February led to the call for a Diplomatic Conference in December.

Some items on the agenda have already been agreed, including the protection of copyright in software and in databases, and the duration of copyright in photographs. Items to be settled are concentrated on rights in the electronic environment, and publishers' demands for the right of digital reproduction and transmission. The debate centres on whether this demand can be met by redrafting the existing Convention articles, or by introducing a new substantive right.

Changes in European law

In Europe the duration of copyright has been extended to life plus 70 years. Furthermore, a new exclusive intellectual property right allowing the database owner to forbid or control the extraction or re-use of material taken from a database. This new right is restricted to databases that can be regarded as the intellectual creation of the author, albeit in the selection or arrangement of content matter, and lasts for fifteen years.

Following its July 1995 'Green Paper', in November 1996 the European Commission adopted a Communication on Copyright and Related Rights in the Information Society. The EU

proposes in early 1997 to act on reproduction rights, online communications, legal protection of anti-copying systems, and distribution rights. The aim is to further harmonise European law. The EU proposes to establish new laws in parallel with international developments, especially concerning the Berne Convention. Its general approach is one of concern about the free movement of information, tempered by a high level of intellectual property protection in order not to inhibit creative work and innovation.

The new US approach: in Harmony with the International Community

The same philosophical approach adopted in Europe underlies the US Copyright White Paper and the Bills which are currently before Congress. In general, the Bills are covering the same ground as the European changes. The strategy is to drive owners and users to use licences. The electronic transmission of copyright material is recognised as a transaction falling under the control of the copyright owner. Browsing is not provided for as a fair use right. The existing fair use provisions continue to apply only to printed works.

Copyright in Australia

Even though Australia is a net importer of intellectual prop-

continued on page 52



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Legally Speaking from page 51

TION: Firm management should review the copyright law — particularly 17 U.S.C. Sections 107-108 — as well as firmwide copying and other copyright related activities before implementing a copyright policy. At a minimum level, this should include a review of *Copyright Office Circular R21: Reproduction of Copyrighted Words by Educators and Librarians*, the *Heller/Wiant Copyright Handbook*, and *Gasaway/Wiant's Libraries and Copy-*

right: *A Guide to Copyright Law in the 1990's*.

2. Management should review carefully all firmwide online database, CD-ROM and software contracts.

3. Management should consider reviewing such seminal cases as:

Sony Corporation of America v. Universal City Studios, 464 U.S. 417 (1984).

Washington Business Information v. Collier, Shannon & Scott, No. CA 91-0305-A (D.C. Va., filed 2/26/91). (Parties settled; no court decision. But see 41 Pat. Trademark & copyright J. BNA) 389 (case

announced and described); 42 PTCJ 619 (settlement announced).

Basic Books v. Kinko's Graphics, 758 F.Supp. 1522 (S.D. N.Y. 1991).

Pasha Publications v. Enmark Gas, 22 U.S.P.Q. 2d 1076 (BNA), Copyright L. Rep. (CCH) P26,881 (N.D. Tex. 1992).

Television Digest v. U.S. Telephone Ass'n., 841 F.Supp. 5 (D.D.C. 1993).

Campbell v. Acuff-Rose Music, 114 S.Ct. 1164 (1994).

American Geophysical Union v. Texaco, 60 F.3d 913 (2nd Cir. 1994). ☛

Continuing Evolution from page 49

erty, and therefore might be expected to take a different approach from that of the USA or the UK, changes are also under way in Australia.

In September 1995 the then Commonwealth Government announced its intention to amend Australian copyright legislation to reflect modern communications technology. The resulting Bill was lost when the Government changed at the last election, but it is worth noting that it was proposed to introduce a new 'transmission right', and to introduce moral rights into Australian law. There is some doubt about the Howard Government's commitment to moral rights legislation in the form proposed, but it is still worth noting that a number of jurisdictions are now considering such rights as having an important role to play in our brave new world.

The Balance Appears to be Shifting

Copyright serves publishers, record companies, television broadcasters and, not least, the film industry. The dominance of the United States in creative works, book publishing and movie-making — drives the rigorous enforcement of US copyright law by the Courts. The position is much the same in the United Kingdom, another substantial exporter of intellectual property. If we believe that copyright, the currency in which Hollywood, the music and software industries, as well as publishers, all trade, is going to be abandoned or weakened, we are simply deluding ourselves.

The answer for scholarly publishing appears to lie in dialogue. Let us devote less energy to arguing as adversaries, and more to the constructive evolution of appropriate licensing arrangements and guidelines to the use of copyright material in the institutions for which that material is, after all, written and published. ☛

Cases of Note from page 48

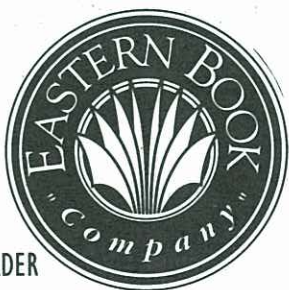
adverse impact on the potential market' for the original" (quoting *Nimmer*, §13.05[A][4], p.113-102.61). In view of all of the above, this factor weighed against a finding of fair use.

In concluding, the Circuit Court agreed that "KCAL's use of LANS's copyrighted tape was arguably in the public interest because it was a perceptive recording of a newsworthy event. However, KCAL's use was commercial and came in the wake of LANS's refusal of a license." There was no evidence that alternatives were not available and, while the tape had been licensed and published before KCAL's use, "it was not obvious that there was no impact on the market for first publication rights as KCAL itself requested a license." Also, there was no dispute that KCAL used the heart of the tape. Therefore, a finding of fair use was not a reasonable conclusion in the view of the Court. ☛



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